

**James Madison to Judge Roane, May 6, 1821.  
Transcription: The Writings of James Madison,  
ed. Gaillard Hunt. New York: G.P. Putnam's Sons,  
1900-1910.**

**TO SPENCER ROANE.MAD. MSS.**

Montpr., May 6, 1821

Dear Sir, —I recd. more than two weeks ago, your letter of Apl. 17. A visit to a sick friend at a distance, with a series of unavoidable attentions have prevented an earlier acknowledgment of it.

Under any circumstances I should be disposed rather to put such a subject as that to which it relates into your hands than to take it out of them. Apart from this consideration, a variety of demands on my time would restrain me from the task of unravelling the arguments applied by the Supreme Court of the U. S. to their late decision.<sup>1</sup> I am

<sup>1</sup> The case referred to is *Cohens v. Virginia*. Chief Justice Marshall handed down the decision, which is highly federal in tone.— 6 *Wheaton*, 257.

Roane wrote five articles under the *nom de plume* Algernon Sydney, against the position of the Supreme Court. They were published in the *Richmond Enquirer* beginning May 25, 1821.

particularly aware moreover that they are made to rest not a little on technical points of law, which are as foreign to my studies as they are familiar to yours.

## Library of Congress

It is to be regretted that the Court is so much in the practice of mingling with their judgments pronounced, comments & reasonings of a scope beyond them; and that there is often an apparent disposition to amplify the authorities of the Union at the expence of those of the States. It is of great importance as well as of indispensable obligation, that the constitutional boundary between them should be impartially maintained. Every deviation from it in practice detracts from the superiority of a Chartered over a traditional Govt. and mars the experiment which is to determine the interesting Problem whether the organization of the Political system of the U. S. establishes a just equilibrium; or tends to a preponderance of the National or the local powers, and in the latter case, whether of the national or of the local.

A candid review of the vicissitudes which have marked the progress of the General Govt. does not preclude doubts as to the ultimate & fixed character of a Political Establishment distinguished by so novel & complex a mechanism. On some occasions the advantage taken

of favorable circumstances gave an impetus & direction to it which seemed to threaten subversive encroachments on the rights & authorities of the States. At a certain period we witnessed a spirit of usurpation by some of these on the necessary & legitimate functions of the former. At the present date, theoretic innovations at least are putting new weights into the scale of federal sovereignty which make it highly proper to bring them to the Bar of the Constitution.

In looking to the probable course and eventual bearing of the compound Govt. of our Country, I cannot but think that much will depend not only on the moral changes incident to the progress of society; but on the increasing number of the members of the Union. Were the members very few, and each very powerful, a feeling of self-sufficiency would have a relaxing effect on the bands holding them together. Were they numerous & weak, the Gov. over the whole would find less difficulty in maintaining & increasing subordination. It happens that whilst the power of some is swelling to a great size, the entire number is

## Library of Congress

swelling also. In this respect a corresponding increase of centripetal & centrifugal forces, may be equivalent to no increase of either.

In the existing posture of things, my reflections lead me to infer that whatever may be the latitude of Jurisdiction assumed by the Judicial Power of the U. S. it is less formidable to the reserved sovereignty of the States than the latitude of power which it has assigned to the National Legislature; & that encroachments of the latter are more to be apprehended from impulses given to it by a majority of advantages, than from the love of Power in the Body itself, controuled as it *now* is by its responsibility to the Constituent Body.

Such is the plastic faculty of Legislation, that notwithstanding the firm tenure which judges have on their offices, they can by various regulations be kept or reduced within the paths of duty; more especially with the aid of their amenability to the Legislative tribunal in the form of impeachment. It is not probable that the Supreme Court would long be indulged in a career of usurpation opposed to the decided opinions & policy of the Legislature.

Nor do I think that Congress, even seconded by the Judicial Power, can, without some change in the character of the nation, succeed in *durable* violations of the rights & authorities of the States. The responsibility of one branch to the people, and of the other branch to the Legislatures, of the States, seem to be, in the present stage at least of our political history, an adequate barrier. In the case of the alien & sedition laws, which violated the general *sense* as well as the *rights* of the States, the usurping experiment was crushed at once, notwithstanding the co-operation of the federal Judges with the federal laws.

But what is to controul Congress when backed & even pushed on by a majority of their Constituents, as was the case in the late contest relative to Missouri, and as may again happen in the constructive power relating to Roads & Canals? Nothing within the pale of the Constitution but sound arguments & conciliatory expostulations addressed both to Congress & to their Constituents.

## Library of Congress

On the questions brought before the Public by the late doctrines

of the Supreme Court of the U. S. concerning the extent of their own powers, and that of the exclusive jurisdiction of Congress over the ten miles square and other specified places, there is as yet no evidence that they express either the opinions of Congress or those of their Constituents. There is nothing therefore to discourage a development of whatever flaws the doctrines may contain, or tendencies they may threaten. Congress if convinced of these may not only abstain from the exercise of Powers claimed for them by the Court, but find the means of controuling those claimed by the Court for itself. And should Congress not be convinced, their Constituents, if so, can certainly under the forms of the Constitution effectuate a compliance with their deliberate judgment and settled determination.

In expounding the Constitution the Court seems not insensible that the intention of the parties to it ought to be kept in view; and that as far as the language of the instrument will permit, this intention ought to be traced in the contemporaneous expositions. But is the Court as prompt and as careful in citing and following this evidence, when agst. the federal Authority as when agst. that of the States? (See the partial reference of the Court to “The Federalist.”)<sup>1</sup>

<sup>1</sup> “The opinion of the *Federalist* has always been considered as of great authority. It is a complete commentary on our constitution, and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed.”— *6 Wheaton*, 294.

The exclusive jurisdiction over the ten miles square is itself an anomaly in our Representative System. And its object being manifest, and attested by the views taken of it, at its date, there seems a peculiar impropriety in making it the fulcrum for a lever stretching into the most distant parts of the Union, and overruling the municipal policy of

## Library of Congress

the States. The remark is still more striking when applied to the smaller places over which an exclusive jurisdiction was suggested by a regard to the defence & the property of the Nation.

Some difficulty, it must be admitted may result in particular cases from the impossibility of executing some of these powers within the defined spaces, according to the principles and rules enjoined by the Constitution; and from the want of a constitutional provision for the surrender of malefactors whose escape must be so easy, on the demand of the U. States as well as of the Individual States. It is true also that these exclusive jurisdictions are in the class of enumerated powers, to wch. is subjoined the "power in Congress to pass all laws necessary & proper for their execution." All however that could be exacted by these considerations would be that the means of execution should be of the most obvious & essential kind; & exerted in the ways as little intrusive as possible on the powers and police of the States. And, after all, the question would remain whether the better course would not be to regard the case as an omitted one, to be provided for by an amendment of the Constitution. In resorting to legal precedents as sanctions to power, the distinctions should ever be strictly attended to, between such as take place under transitory impressions, or without full examination & deliberation, and such as pass with solemnities and repetitions sufficient to imply a concurrence of the judgment & the will of those, who having granted the power, have the ultimate right to explain the grant. Altho' I cannot join in the protest of some against the validity of all precedents, however uniform & multiplied, in expounding the Constitution, yet I am persuaded that Legislative precedents are frequently of a character entitled to little respect, and that those of Congress are sometimes liable to peculiar distrust. They not only follow the example of other Legislative assemblies in first procrastinating and then precipitating their acts; but, owing to the termination of their session every other year at a fixed day & hour, a mass of business is struck off, as it were at shorthand, and in a moment. These midnight precedents of every sort ought to have little weight in any case.

## Library of Congress

On the question relating to involuntary submissions of the States to the Tribunal of the Supreme Court, the Court seems not to have adverted at all to the expository language when the Constitution was adopted; nor to that of the Eleventh Amendment, which may as well import that it was declaratory, as that it was restrictive of the meaning of the original

text. It seems to be a strange reasoning also that would imply that a State in controversies with its own Citizens might have less of sovereignty, than in controversies with foreign individuals, by which the national relations might be affected. Nor is it less to be wondered that it should have appeared to the Court that the dignity of a State was not more compromised by being made a party agst. a private person than agst a co-ordinate Party.

The Judicial power of the U. S. over cases arising under the Constitution, must be admitted to be a vital part of the System. But that there are limitations and exceptions to its efficient character, is among the admissions of the Court itself. The Eleventh Amendment introduces exceptions if there were none before. A liberal & steady course of practice can alone reconcile the several provisions of the Constitution literally at variance with each other; of which there is an example in the Treaty Power & the Legislative Power on subjects to which both are extended by the words of the Constitution. It is particularly incumbent, in taking cognizance of cases arising under the Constitution, and in which the laws and rights of the States may be involved, to let the proceedings touch individuals only. Prudence enjoins this if there were no other motive, in consideration of the impracticability of applying coercion to States

I am sensible Sir, that these ideas are too vague to be of value, and that they may not even hint for consideration anything not occurring to yourself. Be so good as to see in them at least an unwillingness to disregard altogether your request. Should any of the ideas be erroneous as well as vague, I have the satisfaction to know that they will be viewed by a friendly as well as a candid eye.